ALASKA WORKERS' COMPENSATION BOARD

P.O. Box 115512 **Juneau, Alaska 99811-5512**

HUGO ROSALES, Employee, Claimant,	)	FINAL DECISION AND ORDER
v.	)	AWCB Case No. 200706610
ICICLE SEAFOODS, INC., Employer, and	)	AWCB Decision No. 14-0110 Filed with AWCB Anchorage, Alaska on August 7, 2014
SEABRIGHT INS. CO., Insurer, Defendants.	)	

Seven pleadings related to Hugo Rosales's (Employee) May 13, 2007 work injury were heard on July 24, 2014 in Anchorage, Alaska, a date selected on June 26, 2014. Employee appeared telephonically, represented himself, and testified. Attorney Richard A. Nielsen appeared telephonically and represented Icicle Seafoods, Inc. and Seabright Ins. Co. (collectively, Employer). Yolanda Martinez-Ley and Liliana Rey appeared and provided Spanish-language translation.

Preliminary issues were: (1) Employee's December 24, 2013 answer/petition, orally denied by a board designee at an April 22, 2014 prehearing conference, to join the Division of Workers' Compensation's Director, Michael Monagle, and Chief of Adjudications, Janel Wright, as parties to this case; (2) Employee's March 25, 2014 petition, also orally denied by the board designee at the April 22, 2014 prehearing conference, to compel discovery of William Skilling's vocational evaluation report and Employee's case files in the possession of Employer and its insurance

company; (3) Employee's April 29, 2014 "appeal" from the designee's above-referenced April 22, 2014 oral orders; and (4) Employee's June 4, 2014 petition to subpoena medical and rehabilitation evaluation reports from Employer, its insurer, and William Skilling.

After deliberation, the panel issued an oral order denying Employee's joinder and discovery requests, and proceeded to hear the merits issues: (1) Employee's December 3, 2013 petition to set aside a previously approved Compromise and Release agreement (C&R); (2) Employee's December 24, 2013 workers' compensation claim; and (3) Employer's December 17, 2013 petition to dismiss Employee's December 3, 2013 petition and for monetary sanctions against Employee. The record closed at the hearing's conclusion on July 24, 2014.

ISSUES

Employee contends Director Monagle, and Chief Wright, should be joined in this case. The designee orally denied Employee's petition at the April 22, 2014 prehearing conference, stating Employee could not explain how joinder was appropriate and there was no conceivable way the division or any of its employees could be liable to Employee for benefits under the Alaska Workers' Compensation Act (Act). Employee appealed the decision.

Employer contends the designee's ruling should be affirmed. It contends no legal basis for joinder exists.

1) Did the board designee abuse his discretion when he orally denied Employee's December 24, 2013 petition to join Director Monagle and Chief Wright as parties to this case?

Employee contends his February 23, 2010 C&R was based on incomplete medical records, and Employer misrepresented the settlement terms by not submitting all the records in its possession. Employee contends he is entitled to discovery of William Skilling's vocational evaluation report and Employee's complete files in the possession of Employer and its insurance company, because a review of the entire record would demonstrate his due process rights were violated. The designee orally denied Employee's discovery requests at the April 22, 2014 prehearing conference, stating the information sought is irrelevant. Employee appealed the decision.

Employer contends the designee's ruling should be affirmed. It contends the Alaska Supreme Court affirmed decisions refusing to set aside Employee's C&R and the court's decision is final and controlling law. Therefore, Employer contends the information Employee seeks is irrelevant.

2) Did the board designee abuse his discretion when he orally denied Employee's March 25, 2014 petition to compel discovery of William Skilling's vocational evaluation report and Employee's complete files in the possession of Employer and its insurance company?

Seeking the same relief as above, Employee contends he is entitled to discover all medical and rehabilitation evaluation reports from Employer, its insurer, and William Skilling. He contends his petition requesting subpoenas so he can obtain this material should be granted.

Employer contends these documents no longer have legal relevance, because Employee settled his claim in entirety in the February 23, 2010 C&R. Employer contends the petition requesting subpoenas should be denied.

3) Should Employee's June 4, 2014 petition to subpoena medical and rehabilitation evaluation reports from Employer, its insurer, and William Skilling be granted?

Employee contends the preliminary joinder and discovery issues should not have been heard at the same hearing as the merits issues, because if he prevailed on the former he would have no time to prepare for the latter. Employee contends he would be unfairly prejudiced, because Director Monagle and Chief Wright would not be present at the hearing, and the panel would not possess the documents upon which Employee wants to rely in his merits arguments.

Employer contends the parties stipulated to hear both preliminary and merits issues at a single hearing. Moreover, Employer opposes a bifurcated hearing as a further waste of time and resources in a matter it contends was already settled.

4) Was it proper to hear the joinder, discovery and merits issues at a single hearing?

Employee contends his February 23, 2010 C&R should be set aside. He contends he has not had an opportunity to fully litigate his case, and disputes all prior decisions, contending they violated his

constitutional due process rights, failed to follow regulations, and were erroneous, unfair, unjust, and biased.

Employer contends *res judicata* precludes setting aside the parties' previously approved C&R. , It contends Employee's initial request to do so was denied and then litigated through the full Alaska appellate process, and was the subject of a denial of *certiorari* by the United States Supreme Court.

5) *Should the parties' February 23, 2010 C&R be set aside?*

Employee contends his original claim was unjustly settled and his C&R wrongly approved. He contends he is entitled to file a new claim for benefits for the same injury date, from the same employer, and under the same case number.

Employer contends Employee's December 24, 2013 claim should be dismissed, because Employee resolved all disputes arising from his May 13, 2007 injury in his February 23, 2010 C&R. It contends the Alaska Supreme Court refused to set the approved C&R aside.

6) *Should Employee's December 24, 2013 claim be dismissed?*

Employer contends it should be awarded attorney's fees and costs, because Employee's pleadings are frivolous, unreasonable, and brought in bad faith. Employer contends the current litigation is functionally equivalent to an appeal, and therefore Employer is entitled to attorney's fees and costs as a sanction for duplicative and harassing proceedings.

Employee contends there is no legal basis to sanction him. He opposes an award of attorney's fees and costs to Employer.

7) *Is Employer entitled to an award of attorney's fees and costs?*

FINDINGS OF FACT

The following facts and factual conclusions are either undisputed or established by a preponderance of the evidence:

1) Employee was injured during the course and scope of employment on May 13, 2007, when a pan of fish fell on his head. Employer accepted Employee's injury as compensable. A factual and procedural case history is recorded in:

(a) Hugo Rosales Settlement Agreement for AWCB Case No. 200706610, signed by Employee on November 28, 2009 and approved by the board at hearing on February 23, 2010, in which (1) the parties resolved all disputes concerning injuries sustained by Employee while working for Employer, (2) Employer paid $200,000 in a global settlement of Employee's claims under the Alaska Workers' Compensation Act (Act) and federal maritime law, (3) $5,000 of that amount was payable under the Act, and (4) fees and costs incurred by Employee's attorney, Richard J. Davies, were to be paid from the maritime settlement;

(b) *Rosales v. Icicle Seafoods, Inc.*, AWCB Decision No. 11-0064 (May 19, 2011) (*Rosales I*), denying: (1) Employee's petition to set aside or modify the February 23, 2010 C&R, finding not credible Employee's assertions he was not properly informed about the settlement terms and he felt coerced or under duress when he testified at hearing he wanted the settlement approved; and (2) Employer's request for attorney's fees incurred in defending against Employee's petition;

(c) *Rosales v. Icicle Seafoods, Inc.*, AWCB Decision No. 11-0065 (May 25, 2011), an *errata* sheet correcting the number of the prior decision from 11-0064 to 11-0065;

(d) *Rosales v. Icicle Seafoods, Inc.*, AWCB Decision No. 11-0089 (June 22, 2011) (*Rosales II*), denying Employee's untimely petition to reconsider *Rosales I*;

(e) *Rosales v. Icicle Seafoods, Inc.*, AWCAC Decision No. 11-007 (July 11, 2012), affirming *Rosales I* and *Rosales II*, and finding *Rosales I* did not abuse its discretion in approving Employee's C&R and declining to set it aside, because (1) *Rosales I* did not err in finding Icicle did not misrepresent the C&R terms, (2) *Rosales I* did not err in finding the C&R was not the product of duress, and (3) the fact records may have been missing when *Rosales I* approved the C&R was not reversible error in Employee's case;

(f) *Rosales v. Icicle Seafoods, Inc.*, 316 P.3d 580 (Alaska, September 6, 2013), affirming the commission's decision and holding: (1) *Rosales I* had jurisdiction to approve the C&R; (2) the commission correctly concluded the absence of medical records was not reversible error; (3) the commission correctly concluded substantial evidence supported *Rosales I*'s findings regarding misrepresentation and duress; (4) *Rosales I* made adequate findings and adequately considered the evidence; and (5) the hearing officer did not have a disqualifying conflict of interest;

(g) *Rosales v. Icicle Seafoods, Inc.*, Supreme Court Order denying Employee's August 21, 2012 petition for rehearing, No. S-14855 (Alaska, November 21, 2013);

(h) *Rosales v. Icicle Seafoods, Inc.*, Supreme Court Order denying Employee's October 3, 2013 emergency motion to file additional briefing, No. S-14855 (Alaska, November 21, 2013); and

(i) *Rosales v. Icicle Seafoods, Inc.*, 134 S. Ct. 1516 (U.S. Alaska, March 10, 2014), denying Employee's petition for writ of *certiorari*.

This factual recitation incorporates the relevant findings of all the above and addresses only the issues currently in dispute.

2) On December 3, 2013, after losing his appeal to the Alaska Supreme Court, Employee again petitioned the board to set aside the February 23, 2010 C&R. (Petition, December 3, 2013.)

3) On December 17, 2013, Employer petitioned to dismiss Employee's request to set aside the C&R, and for monetary sanctions against Employee. Employer contended the issue had been fully adjudicated by the Alaska Supreme Court, and Employee should be sanctioned for duplicative and harassing proceedings. (Petition, December 17, 2013.)

4) On December 24, 2013, Employee petitioned to compel discovery of William Skilling's vocational evaluation report and Employee's complete files in the possession of Employer and its insurance company. (Petition, December 24, 2013.)

5) On December 24, 2013, Employee petitioned to join Director Monagle and Chief Wright as parties to this case. Employee's answer to Employer's December 17, 2013 petition contended Employee's case had not been fully and finally adjudicated because:

- Employee's Due Process Rights were violated[1]
- Clearly erroneous decision
- Manifestly unjust decisions
- The Law of the Case was ignored by the Alaska Courts.

Footnote 1 stated:

> Employee believes that mistakes were made in this case, that his rights of an impartial and fair hearing were violated, that his rights to be heard and his arguments and evidence be [sic] fairly considered were violated. However, he still think [sic] that discrimination based on his appearance, race, nationality, his trouble (very heavy accent in speaking the English language) in speaking English are not an issue here, at least not yet. (Petition/Answer, December 24, 2013; quotations verbatim.)

6) On December 27, 2013, Employee filed a claim related to the May 13, 2007 work injury. Benefits sought included: temporary total disability (TTD), 12/2007 through present; permanent total disability (PTD), 12/2007 through present; permanent partial impairment (PPI), medical and related transportation, a second independent medical evaluation (SIME), review of the reemployment benefits eligibility decision, penalty, interest, unfair or frivolous controversion, and attorney's fees and costs (1/3 of $5,000). (Workers' Compensation Claim, December 24, 2013.)

7) At a prehearing conference on January 23, 2014, Employer's counsel advised the board designee Employee had appealed the Alaska Supreme Court's decision to the United States Supreme Court. The prehearing conference summary stated:

> Mr. Rosales stated the board, AWCAC and Alaska Supreme Court's decisions were unjust and did not follow the law. He believes he was denied an impartial and fair hearing due to his heavy accent when speaking in English and was discriminated against based on his appearance, race, and nationality. Designee advised Mr. Rosales to contact the Alaska State Commission for Human Rights at 907-274-4692 or 800 A St., Suite 204, Anchorage, AK 99501-3669.
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> Mr. Rosales also believes ethics violations were committed at the board level by members of the hearing panel, the chief of adjudications, and the director, as well as at the appeal's commission. Mr. Rosales was advised to contact Chief Assistant Attorney General Joanne Grace in the Opinions, Appeals and Ethics section of the Civil Division of the Alaska Attorney General's Office at 907-269-5100 to discuss possible violations of the Alaska Executive Ethics Act. The address is Alaska Department of Law-Civil Division, 1031 W. 4th Ave, Suite 200, Anchorage, AK 99501-1994.

> Mr. Rosales may also contact Chief Administrative Law Judge Terry Thurbon, Office of Administrative Hearings, at 907-465-1886 regarding possible violations of the Hearing Officer Code of Conduct. The address is PO Box 110231, Juneau AK 99811-0231.

The designee scheduled a follow-up prehearing on April 22, 2014. (Prehearing Conference Summary, January 23, 2014.)

8) Employee's January 23, 2014 prehearing conference assertion he was discriminated against because of his appearance, race, nationality and heavy foreign accent is found not credible, since a month earlier he stated these factors "were not an issue here, at least not yet" and there was no action on his case in the interim. (Prehearing Conference Summary, January 23, 2014; Petition/Answer, December 24, 2013; judgment, observations, unique or peculiar facts of the case, inferences.)

9) On March 25, 2014, Employee petitioned to compel discovery of William Skilling's vocational evaluation report and Employee's complete files in the possession of Employer and its insurance company. The documents sought were the same as those requested in Employee's December 24, 2013 petition to compel. (Petitions, March 25, 2014 and December 24, 2013.)

10) At a prehearing conference on April 22, 2014, the board designee identified as hearing issues:

> 1) EE's [Employee's] 12/3/13 Petition to set aside previously approved C&R.
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> 2) ER's [Employer's] 12/17/13 Petition to dismiss the above, (again) and for monetary sanctions against EE for filing it after EE settled this case, tried to vacate the settlement, lost before the board, appealed to the AWCAC and lost, appealed to the Alaska Supreme Court and lost, and petitioned the United States Supreme Court for *certiorari*, which was denied.
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> 3) EE's 12/24/13 Answer/Petition to join Mike Monagle and Janel Wright as parties to this case. Orally denied by the designee at the 4/22/14 PHC [prehearing conference] because EE could not explain how joinder was appropriate and because there is no conceivable way the division or any of its employees could be liable to EE for benefits under the Act. **Parties at this PHC stipulated that EE orally appeals this designee decision to the board to be heard at the same time as these other issues.**
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> 4) EE's 12/24/13 claim for benefits, which he confirmed he was seeking for the same date of injury with this ER for the same case number as shown on this

> PHC summary, which he already settled as stated in #2, above. Benefits sought include: TTD (12/2007 through present), alternately, PTD (12/2007 through present), medical and related transportation, SIME, vocational reemployment benefits eligibility, PPI, penalty, interest, unfair or frivolous controversion and attorney's fees and costs (1/3 of $5,000).
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> 5) EE's 3/25/14 Petition to compel discovery of William Skilling's vocational evaluation report and ER's case file. Orally denied by the designee at this PHC because Skilling's report is irrelevant to any issue "properly before the board" because they are irrelevant to any issue properly before the board. **Parties at this PHC stipulated that EE orally appeals this designee discovery decision to the board to be heard at the same time as these other issues.**

The designee further noted:

> EE claims the board, AWCAC and Alaska Supreme Court all violated his due process rights; all three opinions were erroneous and unjust; and AS 23.30.012 was not considered by any tribunal. He contends the US Supreme Court was simply too busy with weightier matters to hear his Petition for *Certiorari*. He also appeals the designee's 4/22/14 oral orders on joinder and discovery, and ER stipulates these appealed issue will also be heard at the 7/23/14 hearing. AS 23.30.001(1); AS 23.30.005(h); AS 23.30.135; 8 AAC 45.050(f).
> . . .
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> After the claims, petitions, issues and defenses were clarified, ER inquired when EE would stop filing pleadings in an already dismissed and settled case. EE stated he would keep filing and fighting until he achieved, as he saw it, due process and justice on his case. Designee suggested the division may have to develop a procedure to screen EE's filings in the future; much like the superior court did with the *DeNardo* pleadings. EE objected to this discussion as the designee giving ER 'legal advice.' The designee told EE he was simply musing over the potential issue the parties had raised and explaining how he understood the court system handled a similar issue. ER's lawyer reassured EE that he had practiced law for 33 years and did not need legal advice from the designee on how to prosecute his client's petition or defend against EE's pleadings now or in the future.

"To ensure quick, fair, efficient and predictable procedures at a reasonable cost to ER," the designee on his own motion scheduled a hearing for July 23, 2014. (Prehearing Conference Summary, April 22, 2014; emphases in original.)

11) On April 29, 2014, Employee "appealed" the designee's April 22, 2014 oral orders regarding joinder and discovery. Employee also objected to: (1) setting a single hearing on all his petitions and claims; (2) Employer's "lying" and "scary tactics" in requesting monetary sanctions without

offering legal authority for same; (3) the designee's comparing Employee to Mr. DeNardo; (4) Employer's *res judicata* defense; and (5) setting a hearing for July 23, 2014, which Employee contended was in violation of AS 23.30.108(c) because he was entitled to a decision on the discovery dispute within 30 days. (Objection to April 22, 2014 Prehearing Conference Summary, April 29, 2014.)

12) On June 4, 2014 Employee petitioned to subpoena all medical and rehabilitation evaluation reports from Employer, its insurer, and William Skilling. The documents sought were the same as those requested in Employee's March 25, 2014 and December 24, 2013 petitions to compel. Employee also requested a prehearing conference. (Petitions, June 4, 2014, March 25, 2014 and December 24, 2013; Request for Conference, [May] 4, 2014.)

13) At a prehearing conference on June 23, 2014, the board designee amended the July 23, 2014 hearing issues to include two additional pleadings:

> (1) EE's 4/29/14 "appeal" from the designee's 4/22/14 oral orders. This pleading was not necessary to perfect an appeal as the parties stipulated EE's objections to the designee's 4/22/14 oral orders on joinder and discovery were appealed and would be heard at the 7/23/14 hearing. EE claims the designee erred by refusing to join Director Monagle and Chief Wright as parties to his claim. EE claims these persons can explain how the board approved a C&R in violation of the Act and case law, because the board allegedly decided issues outside the Act's purview. EE also claims these persons need to interpret statutes pertinent to this claim. It appears EE may want these persons to testify as witnesses, and not be joined as parties. He says he wants them to "explain" the Act, particularly AS 23.30.012. EE also appears to be objecting to the preliminary matters being heard together on 7/23/14; *i.e.*, the discovery and joinder issues and EE's claim on its merits. He does not believe it is fair to schedule the hearing this way, because if he wins on his discovery issue, the board would not have the documents upon which he wants to rely on his claims' merits. The designee declined to schedule two hearings and explained that if the panel on 7/23/14 decided to grant EE's discovery petition, it could continue the hearing on the merits until a date after the discovery was produced. EE objects to ER's request for monetary sanctions. EE also states *res judicata* does not apply here because he has not had an opportunity to litigate an issue and relies upon *Ferguson v. State*, 816 P.2d 134 (Alaska 1991) as support for this position. While it is not clear to what "issue" EE refers, EE apparently argues his due process rights have been violated and he has not yet had an opportunity to litigate this claim of due process violation. EE is advised that, in his hearing brief and at hearing, he needs to clarify and expressly state what due process violations he alleges and how these have not yet been argued before the board. EE also objected to the designee on 4/22/14 setting a

> 7/23/14 hearing on his discovery dispute as he now argues AS 23.30.108(c) required this discovery issue be heard within 30 days. EE did not raise this objection at the 4/22/14 PHC. EE is reminded that the parties on 4/22/14 stipulated to a 7/23/14 hearing on all these issues. 8 AAC 45.050(f)(2-3). As more than 30 days have now passed since the 4/22/14 oral discovery order, EE's 30-day-hearng objection is moot. As stated above, given this case's current status -- *i.e.*, settled in its entirety -- the designee declines to set another hearing to address EE's preliminary issues. EE can raise his objection to the order in which these issues are heard at the 7/23/14 hearing. He can argue his discovery and joinder issues as a preliminary matter. If EE can convince the panel that as a matter of law or fact, his discovery petition has merit, the panel may exercise its discretion and continue the hearing on its merits to a later date.
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> (2) EE's 6/4/14 Petition to subpoena medical and rehabilitation evaluation reports. EE wants the board to subpoena all medical and rehabilitation reports from ER and from William Skilling under AS 23.30.005(h). He says he requested this information before he settled his case and even subpoenaed it, but ER and Skilling ignored his subpoena. [The] designee explained EE *had* a remedy and could have sought the board's assistance on this issue, but since he settled his claim, nothing including this report is relevant anymore. The designee also explained that a vocational expert's report is not a medical record and therefore ER had no duty to file it on a medical summary or serve it unless they wanted to rely upon it at a hearing. If EE requested or subpoenaed it and ER or Skilling refused or failed to produce the report, EE *had* a remedy but lost it when he settled his claim. The designee further advised EE that he has a right to try to subpoena witnesses for his hearing, and explained how that is done, but further advised that the undersigned would not sign such subpoenas because no witnesses or evidence is relevant in light of EE settling his claim in its entirety. The designee further explained assuming EE succeeded in getting someone at the board to issue subpoenas, and the subpoenas were addressed to Division staff or ER's clients, it is likely the subpoenas would be quashed for the same reason set forth above. However, the designee also made it clear he was not trying to dissuade EE from exercising his rights under the Act and the regulations.

The designee noted Employee wanted to ensure Employer and its agents "were aware of" AS 23.30.250, "Penalties for fraudulent or misleading acts; damages in civil actions," though Employee did not raise it as a hearing issue. (Prehearing Conference Summary, June 23, 2014.)

14) On June 26, 2014, the hearing date was changed from July 23, 2014 to July 24, 2014 on the board's own motion. (Employee's computer record.)

15) On June 26, 2014, Employee signed subpoenas for Leauri More of Icicle Seafoods, Inc., Shannon Butler of Seabright Insurance, and William Skilling. Employee mailed the documents

to the board without a cover letter or request of any kind, and therefore no board action ensued. (Subpoenas, June 26, 2014.)

16) On July 16, 2014, Employer petitioned for a protective order against Employee's attempt to subpoena Ms. More, Ms. Butler and Mr. Skilling to appear, testify, or produce documents at the July 23, 2014 hearing. The petition was not delivered to the hearing officer until July 25, 2014, the day after the hearing, but the administrative error was harmless because the subpoenas had not been served and the issue was not raised at hearing. (Petition, July 16, 2014; experience, judgment, observations, unique or peculiar facts of the case, and inferences.)

17) Employee's hearing evidence included a March 4, 2010 letter from Richard J. Davies, the Seattle attorney who represented Employee in the February 23, 2010 C&R settlement negotiations, noting "I enclose a settlement statement and a check draft in the amount of $3,333.33." Mr. Davies explained he withheld $1,666.66 in attorney's fees from the $5,000.00 workers' compensation settlement. Mr. Davies withdrew as Employee's attorney on November 2, 2010. (Settlement statement and check, March 3, 2010; Employee's computer record.)

18) Despite the presence of two Spanish-language interpreters throughout the hearing, at one point Employee briefly chose to speak English. Due to Employee's accent and the distorting nature of the speaker phone, it was at times difficult to understand him and the panel had to ask him to repeat himself. Employer's counsel stated he did not understand 98 percent of what Employee had said in English, but Employer waived any objection to Employee's choice not to use the interpreters. Employee spoke in Spanish and was translated into English for the remainder of the hearing. (Record; observations and unique or peculiar facts of the case.)

PRINCIPLES OF LAW

> **AS 23.30.001. Intent of the legislature and construction of chapter.** It is the intent of the legislature that
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> 1) this chapter be interpreted . . . to ensure . . . quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to . . . employers. . . .

In *Robertson v. American Mechanical, Inc.*, 54 P.3d 777, 779 (Alaska 2002), the Alaska Supreme Court held *res judicata*, or claim preclusion, applies to workers' compensation cases; however it is not always applied as rigidly in administrative as in judicial proceedings. *Id.* at

779-80. When applicable, *res judicata* precludes a subsequent suit between the same parties asserting the same claim for relief when the matter raised was, or could have been, decided in the first suit. *Id.* at 780. Application of the principle requires the issue to be decided to be identical to that already litigated, and a final judgment on the merits. *Id.*

> **AS 23.30.005. Alaska Workers' Compensation Board**.
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> (h) The department shall adopt rules ... and shall adopt regulations to carry out the provisions of this chapter. . . . Process and procedure under this chapter shall be as summary and simple as possible.

The board may base its decision not only on direct testimony, medical findings, and other tangible evidence, but also on the board's "experience, judgment, observations, unique or peculiar facts of the case, and inferences drawn from all of the above." *Fairbanks North Star Borough v. Rogers & Babler*, 747 P.2d 528, 533-34 (Alaska 1987). The Alaska Supreme Court held the board owes a duty to every claimant to fully advise him of "all the real facts" bearing upon his right to compensation, and instruct him how to pursue that right under law. *Richard v. Fireman's Fund Ins. Co.*, 384 P.2d 445, 449 (Alaska 1963).

> **AS 23.30.008. Powers and duties of the commission.** (a) The commission shall be the exclusive and final authority for the hearing and determination of all questions of law and fact arising under this chapter in those matters that have been appealed to the commission, except for an appeal to the Alaska Supreme Court. The commission does not have jurisdiction in any case that does not arise under this chapter or in any criminal case. On any matter taken to the commission, the decision of the commission is final and conclusive, unless appealed to the Alaska Supreme Court, and shall stand in lieu of the order of the board from which the appeal was taken. Unless reversed by the Alaska Supreme Court, decisions of the commission have the force of legal precedent.

> **AS 23.30.012. Agreements in regard to claims**. (a) At any time after death, or after 30 days subsequent to the date of injury, the employer and the employee . . . have the right to reach an agreement in regard to a claim for injury . . . under this chapter . . . but a memorandum of the agreement in a form prescribed by the board shall be filed with the board. Otherwise, the agreement is void for any purpose. If approved by the board, the agreement is enforceable the same as an order or award of the board and discharges the liability of the employer for the compensation notwithstanding the provisions of AS 23.30.130, 23.30.160, and 23.30.245. The agreement shall be approved by the board only when the terms

> conform to the provisions of this chapter and, if it involves or is likely to involve permanent disability, the board may require an impartial medical examination and a hearing in order to determine whether or not to approve the agreement. The board may approve lump-sum settlements when it appears to be in the best interest of the employee.

A workers' compensation settlement agreement is a contract, and subject to interpretation as any other contract. *Seybert v. Cominco Alaska Exploration*, 182 P.3d 1079, 1093-94 (Alaska 2008). Clear and convincing evidence is necessary to set aside a C&R. *Olsen Logging Co. v. Lawson*, 856 P.2d 1155 (Alaska 1993). Clear and convincing evidence is "evidence that is greater than a preponderance, but less than proof beyond a reasonable doubt." It is "that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved." *Buster v. Gale*, 866 P.2d 837, 844 (Alaska 1994), quoting *Castellano v. Bitkower*, 346 N.W.2d 249, 253 (1984).

The Alaska Workers' Compensation Act (Act) does not permit workers' compensation settlement agreements to be set aside due to a unilateral or mutual mistake of fact. *Lawson* at 1158-59. That an employee did not know the extent of his or her disability at the time the agreement was signed is a mistake of fact, and does not justify setting aside a C&R. *Smith v. CSK Auto, Inc.*, 204 P.3d 1001, 1007-08 (Alaska 2009).

A workers' compensation C&R may be voided if based on fraud or misrepresentation. The party seeking to void the contract for fraud or misrepresentation must show, by clear and convincing evidence: (1) a misrepresentation was made; (2) which was fraudulent or material; (3) which induced the party to enter the contract; and (4) upon which the party was justified in relying. *Seybert* at 1093-94.

A C&R may also be voided for duress or coercion. The party seeking to void the agreement for duress or coercion must show, by clear and convincing evidence: 1) one party involuntarily accepted the terms of another; 2) circumstances permitted no other alternative; and 3) such circumstances were the result of coercive acts of the other party. *Helstrom v. North Slope Borough*, 797 P2d 1192, 1197 (Alaska 1990). An employee's own, personal circumstances

cannot form the basis for setting aside a C&R for duress. *Milton v. UIC Construction*, Supreme Court No. S-14161, August 21, 2013.

> **AS 23.30.108. Prehearings on discovery matters; objections to requests for release of information; sanctions for noncompliance.**
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> (c) . . . If a discovery dispute comes before the board for review of a determination by the board's designee, the board may not consider any evidence or argument that was not presented to the board's designee, but shall determine the issue solely on the basis of the written record. The decision by the board on a discovery dispute shall be made within 30 days. The board shall uphold the designee's decision except when the board's designee's determination is an abuse of discretion.

An abuse of discretion occurs where a decision is arbitrary, capricious, manifestly unreasonable, or stems from an improper motive, or where an agency fails to properly apply controlling law or regulation, or to exercise sound legal discretion. *Sheehan v. University of Alaska*, 700 P.2d 1295, 1297 (Alaska 1985); *Manthey v. Collier* 367 P.2d 884, 889 (Alaska 1962); *Black's Law Dictionary* 25 (4th ed. 1968).

> **AS 23.30.122. Credibility of witnesses.** The board has the sole power to determine the credibility of a witness. A finding by the board concerning the weight to be accorded a witness's testimony, including medical testimony and reports, is conclusive even if the evidence is conflicting or susceptible to contrary conclusions. The findings of the board are subject to the same standard of review as a jury's finding in a civil action.

The board has the sole power to determine witness credibility, and its findings about weight are conclusive even if the evidence is conflicting. *See, e.g., Harnish Group, Inc. v. Moore*, 160 P.3d 146, 153 (Alaska 2007); *Thoeni v. Consumer Electronic Services*, 151 P.3d 1249, 1253 (Alaska 2007); *Municipality of Anchorage v. Devon*, 124 P.3d 424, 431 (Alaska 2005).

> **AS 23.30.145. Attorney fees.** (a) Fees for legal services rendered in respect to a claim are not valid unless approved by the board . . .

In *Hulsey v. Johnson & Holen*, 814 P.2d 327, 328-329 (Alaska 1991), the Alaska Supreme Court held in most cases a law firm must obtain board approval before charging an injured employee for legal services rendered in respect to her claim. (A narrow exception to this rule is found in

AS 23.30.260(b) and 8 AAC 45.180(c).) "Notably, AS 23.30.260 makes receiving a fee 'on account of services in respect to a claim' a misdemeanor unless the Board has approved that fee." *Id.* at 328, n.1.

> **AS 23.30.250. Penalties for fraudulent or misleading acts; damages in civil actions.**
> . . .
>
> (b) If the board, after a hearing, finds that a person has obtained compensation, medical treatment, or another benefit provided under this chapter, or that a provider has received a payment, by knowingly making a false or misleading statement or representation for the purpose of obtaining that benefit, the board shall order that person to make full reimbursement of the cost of all benefits obtained. Upon entry of an order authorized under this subsection, the board shall also order that person to pay all reasonable costs and attorney fees incurred by the employer and the employer's carrier in obtaining an order under this section and in defending any claim made for benefits under this chapter. If a person fails to comply with an order of the board requiring reimbursement of compensation and payment of costs and attorney fees, the employer may declare the person in default and proceed to collect any sum due as provided under AS 23.30.170(b) and (c).

AS 23.30.145 and AS 223.30.250 are the only provisions in the Act for payment of attorney's fees. AS 23.30.145 provides for payment of attorneys' fees to an employee when the employee prevails on his claim. AS 23.30.250(b) provides for reimbursement of attorney's fees to an employer who prevails in a claim against an employee for fraud. The Alaska Supreme Court held an appellate court may award attorney's fees to employer-defendants if it finds a claimant's appeal to be frivolous, unreasonable, or brought in bad faith. *Whaley v. Alaska Workers' Compensation Board*, 648 P.2d 955, 960 (Alaska 1982).

> **AS 23.30.260. Penalty for receiving unapproved fees and soliciting.** (a) A person is guilty of a misdemeanor and, upon conviction, is punishable for each offense by a fine of not more than $1,000 or by imprisonment for not more than one year, or by both, if the person
>
> (1) receives a fee, other consideration, or a gratuity on account of any services rendered for representation or advice with respect to a claim, unless the consideration or gratuity is approved by the board or the court. . . .
> . . .

(b) Notwithstanding AS 23.30.145 and (a) of this section, approval of a fee is not required if the fee does not exceed $300 and is a one-time-only charge to an employee by an attorney licensed in this state who performed legal services with respect to the employee's claim but did not enter an appearance.

8 AAC 45.040. Parties.

. . .

(c) Any person who may have a right to relief in respect to or arising out of the same transaction or series of transactions should be joined as a party.

(d) Any person against whom a right to relief may exist should be joined as a party.

. . .

(j) In determining whether to join a person, the board or designee will consider

(1) whether a timely objection was filed in accordance with (h) of this section;
(2) whether the person's presence is necessary for complete relief and due process among the parties;
(3) whether the person's absence may affect the person's ability to protect an interest, or subject a party to a substantial risk of incurring inconsistent obligations;
(4) whether a claim was filed against the person by the employee; and
(5) if a claim was not filed as described in (4) of this subsection, whether a defense to a claim, if filed by the employee, would bar the claim. . . .

8 AAC 45.050. Pleadings.

. . .

(f) Stipulations.

. . .

(2) Stipulations between the parties may be made at any time in writing before the close of the record, or may be made orally in the course of a hearing or a prehearing.
(3) Stipulations of fact or to procedures are binding upon the parties to the stipulation and have the effect of an order unless the board, for good cause, relieves a party from the terms of the stipulation. . . .

8 AAC 45.065. Prehearings. (a) After a claim or petition has been filed, a party may file a written request for a prehearing, and the board or designee will schedule a prehearing. Even if a claim, petition, or request for prehearing has not been filed, the board or its designee will exercise discretion directing the parties or their representatives to appear for a prehearing. At the prehearing, the board or designee will exercise discretion in making determinations on

> . . .
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> (6) the relevance of information requested under AS 23.30.107(a) and AS 23.30.108;
> (7) petitions to join a person;
> . . .
> (10) discovery requests;
> . . .
> (15) other matters that may aid in the disposition of the case. . . .

8 AAC 45.074. Continuances and Cancellations.
. . .

> (b) Continuances or cancellations are not favored by the board and will not be routinely granted. A hearing may be continued or cancelled only for good cause and in accordance with this section. For purposes of this subsection,
>
> (1) good cause exists only when
> . . .
>
> (L) the board determines at a scheduled hearing that, due to surprise, excusable neglect, or the board's inquiry at the hearing, additional evidence or arguments are necessary to complete the hearing;
> . . .
>
> (N) the board determines that despite a party's due diligence, irreparable harm may result from a failure to grant the requested continuance or cancel the hearing. . . .

8 AAC 45.120. Evidence.
. . .

> (e) Technical rules relating to evidence and witnesses do not apply in board proceedings, except as provided in this chapter. Any relevant evidence is admissible if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of such evidence over objection in civil actions. . . .

To be admissible at hearing, evidence must be relevant. *Granus v. Fell*, AWCB Decision No. 99-0016 (January 20, 1999), provided guidance in determining relevancy:

> Parties may obtain discovery regarding any matter, not privileged which is relevant to the subject matter involved in the pending action. . . . To be admissible at hearing,

> evidence must be 'relevant.' However, we find a party seeking to discover information need only show the information appears reasonably calculated to lead to the discovery of evidence admissible at hearing. *Smart v. Aleutian Constructors*, AWCB Decision No. 98-0289 (November 23, 1998).
>
> **8 AAC 45.160. Agreed settlements.** (a) The board will review a settlement agreement that provides for the payment of compensation due or to become due and that undertakes to release the employer from any or all future liability. A settlement agreement will be approved by the board only if a preponderance of evidence demonstrates that approval would be for the best interest of the employee or the employee's beneficiaries. . . .
>
> **8 AAC 45.180. Costs and attorney's fees.**
> . . .
>
> (c) Except as otherwise provided in this subsection, an attorney fee may not be collected from an applicant without board approval. A request for approval of a fee to be paid by an applicant must be supported by an affidavit showing the extent and character of the legal services performed. Board approval of an attorney fee is not required if the fee
>
> > (1) is to be paid directly to an attorney under the applicant's union-prepaid legal trust or applicant's insurance plan; or
> > (2) is a one-time-only charge to that particular applicant by the attorney, the attorney performed legal services without entering an appearance, and the fee does not exceed $300. . . .

ANALYSIS

1) Did the board designee abuse his discretion when he orally denied Employee's December 24, 2013 petition to join Director Monagle and Chief Wright as parties to this case?

Persons who should be joined as parties in a case include: (1) any person who may have a right to relief in respect to or arising out of the same transaction or series of transactions; and (2) any person against whom a right to relief may exist. 8 AAC 45.040(c), (d). Neither Director Monagle nor Chief Wright falls into these categories. Neither's presence was necessary for complete relief and due process among the parties; their absence did not affect Employee's ability to protect an interest, or subject him to a substantial risk of incurring inconsistent obligations; Employee did not file claims against them; and alternatively, even if Employee had filed claims against them, both had defenses that would bar the claims. There is no conceivable way either could be responsible to Employee for benefits under the Act.

8 AAC 45.040(j)(2), (3), (4), (5). There is no legal basis for joining Director Monagle or Chief Wright to this case. The designee's order was not arbitrary, capricious, unreasonable, or the product of an improper motive. *Sheehan; Manthey*. The designee did not abuse his discretion when he orally denied Employee's December 24, 2013 petition to join. 8 AAC 45.065(a)(7).

2) Did the board designee abuse his discretion when he orally denied Employee's March 25, 2014 petition to compel discovery of William Skilling's vocational evaluation report and Employee's complete files in the possession of Employer and its insurance company?

Employee filed two duplicative petitions, signed December 24, 2013 and March 25, 2014, to compel discovery of William Skilling's vocational evaluation report and Employee's complete files in the possession of Employer and its insurance company. Prior to the February 23, 2010 C&R, the documents sought would have met the *Granus* standard for relevancy, since the information would have been reasonably calculated to lead to the discovery of evidence admissible at hearing. However, the C&R resolved all disputes concerning injuries sustained by Employee while working for Employer, and the finality of that settlement was affirmed by the Alaska Supreme Court. Binding legal precedent prohibits a "do-over" and therefore none of the information Employee sought was relevant to the pending action. AS 23.30.008(a); *Granus.* The designee properly applied controlling law, and his order was not arbitrary, capricious, unreasonable, or the product of an improper motive. *Sheehan; Manthey*. The designee did not abuse his discretion when he orally denied Employee's March 25, 2014 petition to compel. AS 23.30.108(c); 8 AAC 45.065(a)(6), (10).

3) Should Employee's June 4, 2014 petition to subpoena medical and rehabilitation evaluation reports from Employer, its insurer, and William Skilling be granted?

Employee's June 4, 2014 petition to subpoena sought the same relief as the December 24, 2013 and March 25, 2014 petitions to compel, and will be denied on the same grounds, as analyzed above.

4) Was it proper to hear the joinder, discovery and merits issues at a single hearing?

At the prehearing conference on April 22, 2014, the parties stipulated to hear five issues at a single hearing: (1) Employee's December 3, 2013 petition to set aside a previously approved C&R; (2) Employer's December 17, 2013 petition to dismiss Employee's December 3, 2013 petition and for monetary sanctions against Employee; (3) Employee's December 24, 2013 workers' compensation

claim; (4) Employee's December 24, 2013 answer/petition to join Director Monagle and Chief Wright; and (5) Employee's March 25, 2014 petition to compel discovery of William Skilling's vocational evaluation report and Employee's case files in the possession of Employer and its insurance company. A prehearing oral stipulation to procedure is binding upon the parties to the stipulation and has the effect of an order unless for good cause a party is relieved from the terms of the stipulation. 8 AAC 45.050(f)(2), (3).

At hearing the parties argued the joinder and discovery issues as preliminary matters. In deliberation, if the panel had found that as a matter of law or fact Employee's petitions on joinder or discovery had merit, the panel would have exercised its discretion and continued the hearing on the remaining issues to a later date, to allow Employee further preparation time. 8 AAC 45.074(b)(1)(L), (N). However the panel denied Employee's requests for joinder and discovery, and therefore no good cause existed to relieve the parties' from their stipulation, or to continue the hearing. A continuance would have unfairly burdened Employer with additional legal expenses, and would have contravened the Act's mandate that process and procedures are to be quick, efficient, fair, predictable, and as summary and simple as possible. AS 23.30.001(1); AS 23.30.005(h). It was proper to hear the joinder, discovery and merits issues at a single hearing.

5) *Should the parties' February 23, 2010 C&R be set aside?*

Employee's December 3, 2013 petition to set aside a previously approved C&R falls squarely into the *res judicata* category, as set out in *Robertson*. Employee is requesting a rehearing of *Rosales I.* The only new substantive issue is the $1,666.66 Employee seeks from attorney Davies, and even that is precluded by *res judicata*, because Employee could have raised it in his first attempt to set aside the C&R. In all other respects the current suit involves the same parties, issues and claims for relief. Not only was *Rosales I* a final judgment on the merits, but it was affirmed by the commission and the Alaska Supreme Court. Contrary to Employee's belief his case was not fully and finally adjudicated, the approved C&R's validity has been permanently settled. Controlling legal precedent precludes any modification of the settlement terms. AS 23.30.008(a). The Alaska Supreme Court decision may only be reversed by the United States Supreme Court, which denied Employee's petition for writ of *certiorari*. The parties' February 23, 2010 C&R will not be set aside.

6) Should Employee's December 24, 2013 claim be dismissed?

Because the parties' February 23, 2010 C&R will not be set aside, it is fully enforceable. The settlement agreement resolved all disputes concerning Employee's May 13, 2007 injury sustained while working for Employer, in accordance with AS 23.30.012. Employee thereby waived all further claims for benefits for this injury under the Act, and his December 24, 2013 claim will be dismissed.

Employee correctly questions his former counsel, Richard J. Davies', actions. The C&R stated attorney Davies was to be paid attorney's fees and costs from the maritime settlement. Subsequently Davies, without approval and in violation of AS 23.30.145(a), withheld $1,666.66 from the $5,000.00 workers' compensation portion of the $200,000.00 global settlement. Under *Hulsey*, Davies' actions could constitute a misdemeanor. However Davies is not a party in the current case and this decision has no jurisdiction to rule on Employee's fee dispute with him. Employee is advised to seek a remedy by serving this decision and order on Davies and, if unable to achieve a satisfactory resolution, to contact the Washington State Bar Association. *Richard*.

7) Is Employer entitled to an award of attorney's fees and costs?

With the exception the claim against Davies, who is not a party to the current dispute, Employee's multiple pleadings seek to re-litigate issues previously heard and decided. Due to *res judicata*, Employee's pleadings are unreasonably and unjustly redundant, and result in a significant waste of the division's and Employer's time and resources. However Employee's pleadings do not constitute an appeal and the Act does not provide for sanctions or the payment of Employer's attorney's fees under the current circumstances. *Whaley.* Neither AS 23.30.145, which provides for payment of attorneys' fees to an employee when the employee prevails on his claim, nor AS 223.30.250(b), which provides for reimbursement of attorney's fees to an employer who prevails in a claim against an employee for fraud, is apposite. Employer will not be awarded attorney's fees and costs.

CONCLUSIONS OF LAW

1) The board designee did not abuse his discretion when he orally denied Employee's December 24, 2013 petition to join Director Monagle and Chief Wright as parties to this case.

2) The board designee did not abuse his discretion when he orally denied Employee's March 25, 2014 petition to compel discovery of William Skilling's vocational evaluation report and Employee's complete files in the possession of Employer and its insurance company.

3) Employee's June 4, 2014 petition to subpoena medical and rehabilitation evaluation reports from Employer, its insurer, and William Skilling will not be granted.

4) It was proper to hear the joinder, discovery and merits issues at a single hearing.

5) The parties' February 23, 2010 C&R will not be set aside.

6) Employee's December 24, 2013 claim will be dismissed.

7) Employer is not entitled to an award of attorney's fees and costs.

ORDER

1) The designee's oral decision to deny Employee's December 24, 2013 answer/petition to join Director Monagle and Chief Wright, as parties to this case is affirmed.

2) The designee's oral decision to deny Employee's March 25, 2014 petition to compel discovery of William Skilling's vocational evaluation report and Employee's case files in the possession of Employer and its insurance company is affirmed.

3) Employee's April 29, 2014 "appeal" from the designee's above-referenced April 22, 2014 oral orders is denied.

4) Employee's June 4, 2014 petition to subpoena medical and rehabilitation evaluation reports from Employer, its insurer, and William Skilling is denied.

5) Employee's December 3, 2013 petition to set aside the parties' previously approved February 23, 2010 Compromise and Release agreement is denied.

6) Employee's December 24, 2013 workers' compensation claim is dismissed.

7) Employer's December 17, 2013 petition for monetary sanctions against Employee is denied.

Dated in Anchorage, Alaska on August 7, 2014.

ALASKA WORKERS' COMPENSATION BOARD

_____
Margaret Scott, Designated Chair

_____
Robert Weel, Member

_____
Stacy Allen, Member

APPEAL PROCEDURES

This compensation order is a final decision. It becomes effective when filed in the office of the board unless proceedings to appeal it are instituted. Effective November 7, 2005 proceedings to appeal must be instituted in the Alaska Workers' Compensation Appeals Commission within 30 days of the filing of this decision and be brought by a party in interest against the boards and all other parties to the proceedings before the board. If a request for reconsideration of this final decision is timely filed with the board, any proceedings to appeal must be instituted within 30 days after the reconsideration decision is mailed to the parties or within 30 days after the date the reconsideration request is considered denied due to the absence of any action on the reconsideration request, whichever is earlier. AS 23.30.127.

An appeal may be initiated by filing with the office of the Appeals Commission: 1) a signed notice of appeal specifying the board order appealed from and 2) a statement of the grounds upon which the appeal is taken. A cross-appeal may be initiated by filing with the office of the Appeals Commission a signed notice of cross-appeal within 30 days after the board decision is filed or within 15 days after service of a notice of appeal, whichever is later. The notice of cross-appeal shall specify the board order appealed from and the ground upon which the cross-appeal is taken. AS 23.30.128.

RECONSIDERATION

A party may ask the board to reconsider this decision by filing a petition for reconsideration under AS 44.62.540 and in accord with 8 AAC 45.050. The petition requesting reconsideration must be filed with the board within 15 days after delivery or mailing of this decision.

MODIFICATION

Within one year after the rejection of a claim, or within one year after the last payment of benefits under AS 23.30.180, 23.30.185, 23.30.190, 23.30.200, or 23.30.215, a party may ask the

board to modify this decision under AS 23.30.130 by filing a petition in accord with 8 AAC 45.150 and 8 AAC 45.050.

CERTIFICATION

I hereby certify the foregoing is a full, true and correct copy of the Final Decision and Order in the matter of HUGO ROSALES, employee / claimant; v. ICICLE SEAFOODS, INC., employer; SEABRIGHT INS. CO., insurer / defendants; Case No. 200706610; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties on August 7, 2014.

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Pamela Murray, Office Assistant